



DEPARTMENT OF THE INTERIOR

Office of the Secretary

National Environmental Policy Act: Implementing Procedures; Addition to Categorical Exclusions for U.S. Fish and Wildlife Service (516 DM 8)

[Docket No. FWS-HQ-FAC-2013-0118; FXFR13360900000-156-FF09F14000]

AGENCY: Department of the Interior.

ACTION: Notice of Final National Environmental Policy Act Implementing Procedures.

SUMMARY: This notice announces the addition of a new categorical exclusion under the National Environmental Policy Act to be included in the Department of the Interior's Departmental Manual for the U.S. Fish and Wildlife Service. The categorical exclusion pertains to adding species to the injurious wildlife list under the Lacey Act. This action will improve the process of listing species by regulation as injurious wildlife and thereby help to prevent their introduction into and spread within the United States.

DATES: The categorical exclusion is effective [INSERT DATE of PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To obtain a copy of the new categorical exclusion, contact Susan Jewell, U.S. Fish and Wildlife Service, MS FAC, 5275 Leesburg Pike, VA 22041; telephone 703-358-2416. You may review the comments received on the proposed categorical

exclusion and other supporting materials online at <http://www.regulations.gov> in Docket No. FWS-HQ-FAC-2013-0118.

FOR FURTHER INFORMATION CONTACT: Susan Jewell, U.S. Fish and Wildlife Service, MS FAC, 5275 Leesburg Pike, VA 22041; telephone 703-358-2416. If you use a telecommunications device for the deaf, please call the Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*, NEPA), Federal agencies are required to consider the potential environmental impact of agency actions. Agencies are generally required to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) or both. However, when a Federal agency identifies categories of actions that under normal circumstances do not have a significant environmental impact, either individually or cumulatively, Council on Environmental Quality (CEQ) regulations allow the agency to establish a categorical exclusion and not complete an EA or an EIS when undertaking those actions (40 CFR 1507.3(b); 40 CFR 1508.4. See also Department of the Interior (Department) NEPA regulations at 43 CFR 46.205). When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs (CEQ 2010).

The U.S. Fish and Wildlife Service (Service or we) has determined that it is appropriate to provide for a categorical exclusion for the Federal action of adding species to the list of injurious wildlife under the Lacey Act (18 U.S.C. 42, as amended; the Act). The Act authorizes the Secretary of the Interior, as delegated to the Service, to prescribe by regulation those wild mammals, wild birds, fish, mollusks, crustaceans, amphibians, and reptiles, and the offspring or eggs of any of the aforementioned, that are injurious to human beings, or to the interests of agriculture, horticulture, or forestry, or to the wildlife or wildlife resources of the United States. The provisions of the Act regarding injurious species protect human health and welfare and the human and natural environments of the United States by identifying and reducing the threat posed by certain wildlife species. Listing these species as injurious under the Act subsequently prohibits individuals of the species from being imported into the United States or transported across State (including U.S. territories) lines. The Act does not restrict export from the United States (provided transport across State lines is not involved), transport within a State or territory, or possession of an animal already imported.

The lists of injurious species are codified in title 50 of the Code of Federal Regulations (CFR) in part 16. The listing of species as injurious is, as an agency action, subject to environmental review under NEPA procedures. The Service has generally prepared EAs for rulemaking actions to add species to the injurious species lists at 50 CFR part 16. In each case, the agency has determined that adding a species to the list of injurious wildlife has no significant effect on the environment. A categorical exclusion would allow the Service to exercise its authority to protect human health and welfare,

certain human and natural environments, and wildlife resources from harm caused by injurious species more effectively and efficiently by precluding the need to conduct unnecessary and redundant environmental analyses.

In 2002, in promulgating two listing rules, the Service used an existing departmental categorical exclusion for policies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature, or that have environmental effects too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process (43 CFR 46.210(i)). Upon further review, the Service believes that this description is not the best representation of why injurious species listings do not have a significant effect on the human environment. Therefore, the Service is adding a new categorical exclusion for the listing of injurious species under the Act. The categorical exclusion will be included in the Departmental Manual in Part 516: National Environmental Policy Act of 1969 in Chapter 8: Managing the NEPA Process—U.S. Fish and Wildlife Service (516 DM 8).

Comments on the Proposal

The Service solicited comments from the public on the proposed new categorical exclusion through three comment periods totaling 120 days. The original notice was published in the **Federal Register** on July 1, 2013 (78 FR 39307) and provided for a 30-day public comment period. Following requests to extend the public comment period, the Department published a notice on August 16, 2013, reopening the public comment period for an additional 60 days (78 FR 50079). The Department published another notice on January 22, 2014 (79 FR 3612), reopening public comment for an additional

30-days. All comments sent to either *prevent_invasives@fws.gov* or to *http://www.regulations.gov* have been considered.

Congressional interest led to an oversight hearing on September 20, 2013, by the House Committee on Natural Resources, Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs. The Service's Assistant Director for Fish and Aquatic Conservation testified.

The Service received more than 5,000 public comments, including a citizen petition of approximately 600 duplicate comments but excluding comments that were inadvertently posted multiple times. The range of comments varied from those that provided general supporting or opposing statements with no additional explanatory information to those that provided extensive comments and information supporting or opposing the proposed designation. The majority of comments were related to the listing of specific species as injurious (whether the Service should list or not), but not about the subject of this notice, which is about the NEPA process relative to a listing as injurious. The Service received comments from three Federal entities, five State governments, commercial and trade organizations, conservation organizations, other nongovernmental organizations, and private citizens. A summary of the comments follows.

Federal Agency Comments

Comment 1: The U.S. Department of Agriculture (USDA) believes that the proposed categorical exclusion will result in better prevention by the Service of entry of more invasive species into the United States by precluding the need to conduct redundant and costly environmental analyses and that it serves a beneficial purpose. USDA is

particularly concerned about injurious species that can negatively affect human beings, agriculture, horticulture, and forestry. USDA agrees with the three justifications for the categorical exclusion submitted by the Department of the Interior and the Service in the July 1, 2013, notice (78 FR 39307).

Response: The Service agrees that the categorical exclusion will make adding species under the Lacey Act more efficient by eliminating the need to develop unnecessary and redundant EAs under NEPA. A more efficient listing process should allow the Service to better prevent the introduction of species that are injurious to the interests listed in the Act.

Comment 2: The Small Business Administration expressed concern that the categorical exclusion would remove transparency to the public. Furthermore, it was unclear why the Department of the Interior would propose a categorical exclusion for the Service's listings under the Lacey Act based upon the premise that those listings will have no environmental impact when, by statute, all wildlife that is proposed to be listed under the Lacey Act must be shown to have an injurious environmental impact.

Response: The Service spoke with the commenter after this comment was submitted and explained that all other aspects of the listing process under the Lacey Act, including the injurious species analysis, economic analysis, and Regulatory Flexibility Act analysis (for small businesses), would still be prepared, and the public would have an opportunity to comment under these various laws and Executive Orders. The Service also explained that species that are injurious would have a negative environmental impact if they were *not* listed, not if they *were* listed. The commenter requested that the Service

post that information so that the commenter could refer future questioners to that clarifying information. The Service subsequently posted clarifying information on its website.

Comment 3: The National Park Service supports a new categorical exclusion for the listing of species as injurious in the interest of expediting the listing process and addressing nonnative species threats as early as possible to minimize the scale and scope of adverse impacts. Nonnative species represent one of the greatest emerging threats to the integrity of National Park Service ecosystems. Listing under the Lacey Act provides Federal and State agencies with legal and regulatory tools to prevent the import, spread, and introduction of some of the most harmful species.

Response: The Service agrees that conducting NEPA review through the categorical exclusion process should make listing species under the Lacey Act more efficient by eliminating the need to produce unnecessary EAs. This in turn should help protect wildlife and wildlife resources, such as those in the National Park system.

Comments from States

Comment 4: The Association of Fish and Wildlife Agencies (AFWA), which represents North American fish and wildlife agencies, received comments from their Invasive Species Committee and other members of AFWA. All comments from the Committee indicated some level of support for measures to make the listing process more efficient. However, AFWA members were also concerned about the unintended consequences of the categorical exclusion on economic impacts to States, industries, and others. AFWA did not take a formal stance on the categorical exclusion. Instead, they

stated their concerns related to the Federal listing of species as injurious, which they believe erodes the States' authorities to manage fish and wildlife. Their recommendations for the Service include: Working with the State fish and wildlife agencies to identify the States' priorities for injurious wildlife concerns; implementing methods outside of NEPA to reduce the time required to complete listings; and ensuring that NEPA analyses include the human environment, specifically the economic impact that the States would incur with respect to eradications and restoration following introductions of injurious wildlife, including impacts due to unintended consequences as a result of listing.

Response: The Service signed a memorandum of understanding in June 2013 with AFWA and the Pet Industry Joint Advisory Council to help identify high-risk species more rapidly and to provide the States and pet industry with scientific information needed for them to help prevent importations of high-risk species under their own regulations and voluntary measures. The Service has already made summaries of this scientific information for some high-risk species available to the public on its website and is working on hundreds of more summaries, which the Service will also post publicly when completed. Therefore, the Service is working with AFWA to address priority species by providing States with the information they can use for their own injurious prevention methods and to streamline the listing process by using new methods to rapidly screen and prioritize species for listing or other risk management actions, either by the Service or any State.

The Service interprets AFWA's concern about ensuring through NEPA that the economic impact of not listing (thus incurring need by the States to expend funds for

eradication and restoration) or of listing (with unintended consequences) to mean that economic effects of injurious species listings should be clear. Under other laws and Executive Orders not related to NEPA, the Service will continue to provide required analysis on the economic effects of listing a species under the Lacey Act, including effects on small businesses and governments if appropriate, and any other required determinations. To the extent AFWA is concerned about losing NEPA analysis on economic impacts to States, industries, and others, the purpose of an EA is to determine whether to prepare a finding of no significant impact or an EIS (see 43 CFR 46.300). The Service has always found and foresees that it would generally find that listing a species as injurious would have no significant impact on the environment and therefore no EIS is required. CEQ regulations clarify that economic and social effects of an agency action by themselves cannot require preparation of an EIS (see 40 CFR 1508.14), and therefore NEPA is not the appropriate means of considering purely economic impacts of an agency's proposed action. Finally, the comment regarding whether Federal listing of injurious species erodes States' authority to manage resident fish and wildlife is beyond the scope of this action, which addresses the appropriateness of a categorical exclusion under NEPA.

Comment 5: Florida Department of Agriculture and Consumer Services (FDACS) opposes the categorical exclusion because of unintended consequences of not considering alternatives. FDACS gives, as an example, its potential interest in undertaking research on control of schistosomiasis, a devastating disease of tropical countries, using triploid sterile black carp. FDACS states that the current process listing "injurious species"

precludes the development and use of these black carp as a tool to improve human health. FDACS recommends that the Service reassess the application of NEPA relative to listing injurious species from the perspective that certain nonnative species are utilized or can be utilized to the benefit of humans and human and natural environments.

Response: The Service recognizes that even some injurious species may provide benefits to humans and human environments. The Lacey Act provides that species listed as injurious wildlife may be imported and transported by permit for scientific, medical, educational, or zoological purposes. Research such as the commenter describes may be eligible for such a permit. The addition of the categorical exclusion will not affect the permitting process. In addition, the existence of a categorical exclusion is not the end of NEPA review. The Service will still have to determine, on a case-by-case basis, whether the listing of any species as injurious would trigger one of the “extraordinary circumstances” found at 43 CFR 46.215, in which case a normally excluded action would require additional analysis through an EA or EIS. One of the extraordinary circumstances is when an action may have significant impacts on public health or safety.

Comment 6: FDACS recommends that the “agency implement Environmental Assessments or Environmental Impact Analysis processes to determine alternative courses of action and not for the sole purpose of supporting a species listing decision.”

Response: As explained above, even with the categorical exclusion in place, the Service will consider each potential listing on a case-by-case basis to determine whether the listing of that particular species would trigger one of the extraordinary circumstances found at 43 CFR 46.215, in which case a normally excluded action would require

additional NEPA analysis through an EA or EIS, which would include reasonable alternatives. In other cases, a categorical exclusion is appropriate and necessary to reduce delays in the Lacey Act listing process for listings that do not have significant individual or cumulative effects on the environment.

Comment 7: FDACS provides citations for guidance on risk assessments for listings.

Response: The Service appreciates FDACS's contributions.

Comment 8: The Indiana Department of Natural Resources supports the categorical exclusion. The agency states that the proposed categorical exclusion serves to make the listing process under the Act more efficient and will limit undesirable environmental and economic effects associated with the injurious species.

Response: We appreciate the Indiana Department of Natural Resources' support.

Comment 9: The Kentucky Department of Fish and Wildlife Resources supports the categorical exclusion. The agency gave an example of a species it wishes to have federally listed as injurious.

Response: We appreciate the Kentucky Department of Fish and Wildlife Resources' support.

Comment 10: Arizona Game and Fish Commission supports this categorical exclusion and the effect it will have on protecting native wildlife from the harmful impacts of invasive exotic species. Their only concern is that, in rare and currently unknown circumstances, this action (obtaining a categorical exclusion) may inhibit their ability to manage fish and wildlife resources.

Response: We appreciate the Arizona Game and Fish Commission's support. The Service hopes to work with States on priorities for listing, especially those species' listings that would assist with the protection of a State's resources. Although the comment did not give an example of a case where using the categorical exclusion may inhibit their ability to manage fish and wildlife resources, we will review each proposed listing on a case-by-case basis when deciding whether the categorical exclusion is applicable.

Comment 11: Mississippi Department of Agriculture and Commerce expressed concern that listing species as injurious has the unintended consequence of eliminating jobs and of economic loss. The commenter provided an example of the black carp, which caused a loss of jobs in the State when the species was listed.

Response: Comments regarding the economic effects of listing species as injurious under the Lacey Act are beyond the scope of this action, which addresses the appropriateness of a categorical exclusion under NEPA. Nonetheless, as it did with the black carp listing, the Service will continue to provide analysis on the economic effects of listing a species, including effects on small businesses and governments if appropriate and any other required determinations, as required under other laws and Executive Orders not related to NEPA.

Public Comments

Comment 12: Several commenters asserted that without completion of an EA or EIS, there will be less public participation in the listing process, and parties that may be affected by a listing will be left without a chance for significant input. One commenter

stated that these same persons would be without legal recourse and that the categorical exclusion bypasses due process of law. Another commenter stated that public comment opportunities would be diminished without NEPA analysis.

Response: The Service disagrees. Development and application of a categorical exclusion is one type of NEPA review and does not bypass due process. Along with the opportunity to comment on the proposed categorical exclusion, the public will be able to comment on the appropriateness of applying the categorical exclusion whenever a proposed rule to list a new species is published. The Service will also continue to consider each potential listing on a case-by-case basis to determine whether the listing of that particular species would trigger one of the extraordinary circumstances found at 43 CFR 46.215, in which case a normally excluded action would require additional NEPA analysis through an EA or EIS, which would include public involvement. The Service will also continue to follow all applicable statutes, Executive Orders, and regulations, including the Administrative Procedure Act (APA) and Regulatory Flexibility Act of 1980 (Public Law 96-354), when making listing decisions. Under the APA and other law (separate from NEPA), the public will still be provided with the opportunity to review and comment on proposed rules and accompanying documents. The categorical exclusion will not eliminate the opportunity for legal recourse. Please also see the responses to Comments 15 and 23.

Comment 13: A commenter supports the control of invasive species. The commenter believes that full analysis of all environmental, scientific, and economic

impacts (including cost–benefit determinations) associated with any injurious wildlife listing is essential.

Response: The Service appreciates the commenter’s support of invasive species control. However, the Service is striving to be one step ahead and preclude the need to control invasive species by preventing their introduction to new areas, an approach that is significantly more effective and less obtrusive to the public. By conducting NEPA review through application of the categorical exclusion process, the Service can reduce delays in the Lacey Act listing process while continuing to consider situations where analysis of environmental effects through development of an EA or EIS may be appropriate. In addition, the Service will still complete all required determinations that involve analysis of other environmental and economic impacts.

Comment 14: A commenter referred to their comments submitted for the Service’s proposed rule to list nine species of large constrictor snakes as injurious (75 FR 11808; March 12, 2010).

Response: The Service addressed these comments related to the large constrictor snake proposed rule in the final rule to list the Burmese python and three other species (75 FR 3330; January 23, 2012). They involved the Risk Assessment (Reed and Rodda 2009), cold tolerance of the species, use of boas and pythons by zoological institutions, informal education using reptiles, and coordination for management of invasive species. In addition, these comments relate to the Service’s process for listing species under the Lacey Act and its consideration of the constrictor snakes in particular, which is outside

the scope of this action that addresses the appropriateness of a categorical exclusion under NEPA.

Comment 15: The proposal gives the Service too much authority to list species that may not warrant listing. The careful consideration of economic impacts is especially important in Lacey Act decisions because the Act, on its own, does not explicitly require the Service to consider economic impacts in listing or permitting decisions. Under the Endangered Species Act, the Service must consider the economic impacts of designating critical habitat. The Lacey Act is different and does not specifically require this action. Granting an exclusion would allow the Service to bypass economic considerations when listing species. The only meaningful opportunity to consider economic and social impacts is through NEPA analysis because NEPA requires agencies to weigh competing factors and explain the decision to select their preferred alternative.

Response: The listing process remains the same under the Lacey Act, and the Service must still prepare a thorough evaluation consistent with standards under the APA and all other applicable laws and Executive Orders. The commenter is incorrect that conducting NEPA review through the categorical exclusion process would allow the Service to bypass economic considerations. The Service must still comply with all determinations required by the statutes and Executive orders that govern the Federal rulemaking process, which includes a separate economic analysis prepared under the Office of Management and Budget's guidelines.

Comment 16: An environmental coalition favors the proposed categorical exclusion. Generally, their component groups disfavor NEPA categorical exclusions, but

in this case, it makes sense. The United States has one of the developed world's slowest and costliest known systems for regulating imports of nonnative injurious animals. The organization also points out that, contrary to the opposing position that the categorical exclusion might weaken the economic analyses that the Service conducts for listings, the environmental assessments under NEPA analyze only the effects that flow from environmental impacts.

Response: The Service agrees with the commenter's appraisal of the United States' inefficient system for protecting the country against invasion and disease risks. The Service also agrees with the assessment that the economic analysis it prepares under Executive Order (E.O.) 12866, separately from NEPA analysis, is the more informative analysis of the effects of listing. The Service will continue to prepare this analysis when appropriate.

Comment 17: In rare circumstances, such as this Service proposal, review under NEPA may be redundant. The commenter supports the Service's categorical exclusion. The commenter also notes that recent debates surrounding listings have focused on the effects of such listings on small businesses that buy and sell wildlife. However, the commenter notes that a categorical exclusion would not negate the Service's requirement to consider the economic impact to small businesses.

Response: The Service agrees with the commenter's appraisal of the situation regarding economic analyses for small businesses. Those impacts are addressed under separate economic analysis required by E.O. 12866 (Regulatory Planning and Review),

the Regulatory Flexibility Act, and the Small Business Regulatory Enforcement Fairness Act.

Comment 18: The Service has not published its listing criteria, other than in recent listing rules. The commenter believes that the Service should have published its listing criteria before seeking the categorical exclusion.

Response: How the Service determines whether a species qualifies as injurious under the Lacey Act is not related to the environmental effects analysis under NEPA and therefore is beyond the scope of this notice. Nonetheless, the Service notes that while it has not published the factors it considers to determine injuriousness in a stand-alone document, the agency has published them with its proposed and final rules for many years. In addition, the Service has posted the process for preparing proposed and final rules (“Injurious Wildlife Evaluation Process Flow Chart”) on its publicly accessible website for more than 5 years

(http://www.fws.gov/injuriouswildlife/pdf_files/InjuriousWildlifeEvaluationProcessFlowChart.pdf).

Comment 19: An EA is a critical and essential component of any evaluation of a nonnative species as a potential injurious species, and the Service is sidestepping this process. The Service cannot evaluate a species for injuriousness without an EA.

Response: The commenter is confusing two actions involved with listing a species as injurious. The first action is that the Service must determine if the species is injurious under the Lacey Act. This evaluation is presented in the preamble of each proposed and final listing rule. Nothing about this evaluation is changing. Separate from the evaluation

of injuriousness, the Service conducts its NEPA review, which in the past had been through development of an EA that evaluated environmental effects of a listing along with alternatives to listing—not whether the species is injurious. This fundamental difference has confused many commenters.

Since the enactment of NEPA, the Service has conducted formal NEPA analyses for injurious species listings spanning 33 years for the following taxa: raccoon dog (1982), three species of Chinese mitten crabs (1989), brown tree snake (1990), three species of Asian carps (2007), and eight species of large constrictor snakes (2012, 2015). These assessments all resulted in findings of no significant impact (FONSI) without requiring mitigation measures, and, therefore, did not require further analysis and preparation of an EIS.

Comment 20: A commenter disagrees with the Service’s justification that keeping species out of the country and preventing their spread across State lines justifies what they characterize as noncompliance with NEPA and disagrees that listing species under the Lacey Act has no significant effect on the human and natural environment.

Response: Application of a categorical exclusion is one type of NEPA review and not an attempt to sidestep it. The Service will still evaluate, on a case-by-case basis, whether any of the extraordinary circumstances under 43 CFR 46.215 apply before utilizing the categorical exclusion as its means of complying with NEPA. In addition, the purpose of listing a species as injurious is to maintain the baseline condition of that species’ presence in a State or U.S. territory or in the United States. This means that no new individuals of a listed species would be imported into the United States or

transported across State lines unless authorized under a permit, which sets strict conditions to control and prevent release or escape of the animal. The Lacey Act prohibits import and interstate transport, but does not prohibit possession or intrastate transport. Therefore, if a species has not yet been imported into the United States, it will continue not to be introduced into the United States and continue to have no effect on the U.S. environment. If a species has been imported into the United States, it may remain in the States and U.S. territories where it already occurs at the time of listing (as allowed by State or territorial law), but will not be transported to other States and territories where it does not yet occur. Thus, the environmental effects likewise remain the same upon listing, both for those States and territories where the species already occurs, and for those States and territories where it does not and will not occur. Furthermore, the standard for a categorical exclusion is that there is no “significant” effect, not that there is no effect. The Service believes it has made its case that, because adding a species as injurious merely maintains the environmental status quo, these listings qualify for a categorical exclusion as actions that do not have a potentially significant environmental impact, either individually or cumulatively. We have expanded and clarified the discussion for why adding species to the list of injurious species qualifies for a categorical exclusion in this final notice.

Comment 21: An EIS is an essential tool for decisionmaking in evaluating the positive and negative effects of a proposed action.

Response: An EIS is not required if the action agency finds there will be no significant effect on the environment from the action. In evaluating whether adding

species as injurious under the Lacey Act is appropriate for a categorical exclusion, the Service has found that such listings qualify as a category of actions that has no significant individual or cumulative effect on the quality of the human environment.

Comment 22: The Service relies on different criteria for listing an unintentionally introduced species versus intentionally imported species and also different criteria for species not yet in the United States versus those already here.

Response: The Service does not use different criteria to evaluate intentionally versus unintentionally introduced species or for those species already imported into the United States versus those not yet imported into the United States. Each species is evaluated on a case-by-case basis using factors that are explained in each proposed and final rule. The results of considering these factors will vary, however, depending on the species' situation. For example, for species that have already been introduced into the United States and are invasive, the Service has more supporting evidence that additional animals of the same species can escape or be released into the wild. This type of information is not available for species that have never been imported into the United States. The Service has listed one unintentionally introduced species, the brown tree snake (55 FR 174390; April 25, 1990). That rule used an earlier, simplified version of criteria to determine injuriousness.

Comment 23: Without an EA, all nonnative species would be “guilty until proven innocent,” an apparent reference to the Service’s initiative in 1973 to create a list of species that are approved for import, with any other species of Service-listable wildlife prohibited from import. The commenter further states that, if an EA or EIS is no longer

required, the Service will categorically indulge in listing species “with great abandon.”

Another commenter noted that if the Service is planning to substitute some process in lieu of an EA or EIS to add injurious species, no such mechanism is provided in the notice.

Response: These comments reflect an incorrect understanding of the role of the EA or EIS in the listing process. An EA or EIS does not determine a species’ injuriousness (see response to Comment 19 for the discussion on the role of the listing analysis under the Lacey Act as compared to environmental review under NEPA). For its evaluations for injuriousness, the Service uses risk assessments, evaluation criteria, and peer review. The Service makes the scientific sources it uses available to the public. The Service prepares separate economic analyses to explain what the economic effect of such a listing could have on the U.S. economy (including small businesses). In addition, as explained above (see response to Comment 12), application of the categorical exclusion process will still involve consideration of any applicable extraordinary circumstances under NEPA. Even with a categorical exclusion, the listing process will still be intensive and time-consuming.

Comment 24: The Service should differentiate between first-time introductions and species already in international trade or present in the United States. For species in trade or already in the United States, the Service should automatically conduct a NEPA-styled EA as well as an EIS as a matter of course.

Response: The commenter does not express disapproval of the Service using a categorical exclusion for first-time introductions (species not yet present in the United States). Rather, the commenter states that a categorical exclusion would be inappropriate

for species that are already present in the United States. As explained earlier, the Service stands by its reasoning for why adding species as injurious qualifies for a categorical exclusion under NEPA, regardless of whether the species has already been imported into the United States or not (see response to Comment 20). Nonetheless, the Service will determine on a case-by-case basis whether extraordinary circumstances apply before utilizing the categorical exclusion to comply with NEPA.

Comment 25: A commenter describes their issues with the Service's final environmental assessment for four species of large constrictors snakes (January 2012). For example, the Service failed to acknowledge any adverse environmental impacts in the EA.

Response: The Service's analysis contained in any particular previous EA is beyond the scope of this action, which addresses the appropriateness of a categorical exclusion under NEPA for adding species under the Lacey Act. Nonetheless, the Service notes that, in the final environmental assessment for the four species referenced by the commenter (January 2012), the Service stated this potential adverse environmental impact: "It is plausible that owners of large constrictor snakes may intentionally release their snakes in reaction to Federal regulation. This outcome would be contrary to the agency's intent of stopping spread through interstate movement and importation for approved purposes. * * * Alternative 1, the no action alternative, would minimize the unintended consequence of pet owners unlawfully releasing snakes in reaction to Federal regulation."

Comment 26: The commenter doubts that a Federal action under a law that is explicitly intended to protect the environment can ever qualify for a categorical exclusion. This is especially so given that the Lacey Act is both an environmental and criminal statute.

Response: CEQ regulations (see 40 CFR 1508.4) and CEQ guidance (CEQ 2010) specifically allow for development and use of categorical exclusions for Federal agencies as one type of NEPA review, with no qualification that actions under certain types of laws, whether environmental or criminal, are not appropriate for categorical exclusions. The Service has explained why adding species as injurious species under the Lacey Act meets the standards for a categorical exclusion (see response to Comment 20). The extraordinary circumstances were developed to accommodate situations that are not appropriate for a particular categorical exclusion when a typically excluded action may have a significant environmental effect and therefore require additional analysis and action. In addition, the needs raised by the commenter for “careful scientific scrutiny” and rigorous justification of findings will continue to be provided through the Service’s Lacey Act analysis. Regarding the issue of the Lacey Act being a criminal statute, see the response to Comment 28.

Comment 27: It is inappropriate and unlawful to apply a categorical exclusion to listings like those for the constrictor snakes (referring to 75 FR 11808; March 12, 2010), if they are controversial, based on uncertain science, entail potential adverse environmental effects, and impact large numbers of individuals and businesses.

Response: The Department's NEPA procedures at 43 CFR 46.215 identify extraordinary circumstances under which applying a categorical exclusion would be inappropriate and further NEPA review is needed. These circumstances include where there is a high level of controversy over the environmental effects of a proposal and where effects on the environment are highly uncertain and potentially significant or involve unique or unknown environmental risks. In these situations, an EA or EIS would be prepared. Regardless of the level of NEPA review, the Service will prepare an impact analysis on potential impacts to small business under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; Public Law 104-121) and comply with the Regulatory Flexibility Act. In addition, the Lacey Act listings referenced by the commenter were finalized before finalization of this categorical exclusion, so no determination was made whether the categorical exclusion would have been appropriate in that situation. Furthermore, EAs were prepared for both constrictor snake injurious listing rules (75 FR 11808, March 12, 2010; 80 FR 12702, March 10, 2015), both of which resulted in FONSI.

Comment 28: Several commenters who oppose the categorical exclusion focused on the Service's comparison between the proposed categorical exclusion and the existing categorical exclusion for certain research, inventory, and information collection activities. They noted that injurious wildlife listings are significantly different in their effect from research, inventory, and information collection activities. A few commenters used this as a basis to argue that the justifications presented with the proposed categorical exclusion did not adequately support the exclusion. Some commenters raising this concern noted

that injurious species listings involve the threat of criminal sanctions and environmental and economic effects.

Response: The Service agrees that research, inventory, and information collection activities are substantively different from listing species as injurious under the Lacey Act and used the categorical exclusion referred to by the commenters only as an example of consistency with existing approved categorical exclusions because it is directly related to the conservation of fish and wildlife resources “as long as they do not involve, among other things ‘introduction of organisms not indigenous to the affected ecosystem’”. Under that categorical exclusion, activities that may result in the introduction of a nonindigenous species prevents application of the categorical exclusion, thereby recognizing the environmental impact that such introductions may have. Here, adding a species as injurious under the Lacey Act prevents the introduction of nonindigenous species not already present (either in particular States and territories or, for species not yet imported, in the United States overall), thereby avoiding the environmental effects that would be caused by the species. In addition, other categorical exclusions have been approved that may involve the potential for criminal penalties or economic effects because they involve public use (see 516 DM 8.5 C)

- “(1) The issuance * * * of permits for activities involving fish, wildlife, or plants regulated under [Service regulations] when such permits cause no or negligible environmental disturbance. These permits involve endangered and threatened species, species listed under the Convention on International Trade in Endangered

Species of Wild Fauna and Flora (CITES), marine mammals, exotic birds, migratory birds, eagles, and injurious wildlife.”

- “(3) The issuance of special regulations for public use of Service-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental effects.”
- “(5) The issuance or reissuance of special use permits for the administration of specialized uses, including agricultural uses, or other economic uses for management purposes, when such uses are compatible, contribute to the purposes of the refuge system unit, and result in no or negligible environmental effects.”

Comment 29: The Service justifies the categorical exclusion because the listing action is taken under an environmental law. The commenter states that a categorical exclusion is even less justified under the Lacey Act than it is for actions under other conservation laws, such as the Endangered Species Act (ESA), which the commenter states provides for detailed NEPA-like analysis.

Response: The Service does not justify the categorical exclusion simply on the basis that it is an action taken under an environmental law. Rather, the notice (78 FR 39307; July 1, 2013) explained that adding species to the list of injurious wildlife preserves the environmental status quo as one of the justifications for qualifying for the categorical exclusion. See the response to Comment 20 for more details. In addition, the cases cited by the commenter are not applicable. Those cases involved designation of critical habitat under the ESA where the Service argued that NEPA did not apply. Here the Service does not argue that NEPA does not apply to the listing of species under the

Lacey Act. Rather the Service has shown how adding species under the Lacey Act meets the NEPA standard for having no significant individual or cumulative effect on the quality of the human environment. As such, the Service will be conducting NEPA review when it lists injurious species in the future, using the process of applying the categorical exclusion and considering potentially applicable extraordinary circumstances.

Comment 30: A commenter states that the public raised comments on the proposed constrictor snake rule and draft EA about the listing's adverse impact on captive-breeding programs and associated research for threatened and endangered species. Other comments included that listing the constrictor snakes could delay necessary interstate and international animal transfers necessary for rare species survival programs and that the Service gave inadequate attention to the concern that listing the snakes would provide owners with an incentive to release their animals to the wild. The commenter uses these as examples to argue that NEPA is the only applicable law in the injurious-species listing process that provides for evaluation of environmental benefits and adverse impacts.

Response: Comments received on any particular past EA and the Service's response to those comments is beyond the scope of this action, which addresses the appropriateness of a categorical exclusion under NEPA for adding species under the Lacey Act. Nonetheless, the Service notes that it responded to those comments in its final rule for the large constrictor snakes (75 FR 3350; January 23, 2012;). To the extent the commenter relies on these as examples of alleged impacts that would receive no analysis under the categorical exclusion process, as noted earlier, application of a categorical

exclusion also includes consideration of the extraordinary circumstances listed at 43 CFR 46.215. These include when the action may “have significant impacts on public health or safety,” “have significant impacts on species listed, or proposed to be listed, [under the ESA] or have significant impacts on designated critical habitat for these species,” “have significant impacts on such natural resources and unique geographic characteristics as [park lands, refuges, wilderness areas, prime farmlands, wetlands] and other ecologically significant or critical areas,” and “have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.” The commenter and others will have the opportunity to raise these or similar alleged effects to assert why the Service should not rely on the categorical exclusion in future listing decisions and should instead conduct additional NEPA review through preparation of an EA or EIS.

Comment 31: The existence of an exclusion to add injurious species under the Lacey Act will lead the Service to default to a no-analysis mode, even in circumstances that do not justify its use.

Response: As noted previously, the existence of a categorical exclusion is not the end of an agency’s NEPA review. CEQ and Department regulations are clear that an agency must also consider whether any extraordinary circumstances apply, in which case further NEPA analysis and documents must be prepared for the action. The Service will consider each future listing decision on a case-by-case basis to assess whether any of the extraordinary circumstances apply to the listing of that particular species. In addition, final NEPA decisions, including invocation of a categorical exclusion, is legally

reviewable, so persons who believe that the Service has defaulted to a “no-analysis mode” have legal recourse.

Comment 32: The [constrictor snake] listing has economic impacts that are orders of magnitude greater than any previous listing. The commenter notes that while such impacts are not environmental, they are relevant to the “human environment.”

Response: A category of actions is appropriate for a categorical exclusion if they “do not individually or cumulatively have a significant effect on the human environment” See 40 CFR 1508.4. The “human environment” includes “the natural and physical environment and the relationship of people with that environment.” 40 CFR 1508.14. But CEQ NEPA regulations further indicate in this same section that purely “economic or social effects are not intended by themselves to require preparation of an [EIS].” Therefore, while it is possible that adding certain species to the list of injurious species under the Lacey Act could have significant economic effects, an EA or EIS is not necessarily the appropriate means to evaluate such effects. In this case, the economic impacts that the commenter refers to are on the reptile industry. The Service’s economic analysis for the constrictor snakes, conducted under E.O. 12866, was separate from NEPA analysis and fully analyzed the effects that the commenter raised.

Comment 33: Two species of fish important to U.S. aquaculture have been listed as injurious, and, if environmental assessments were completed, no alternatives were offered for public comment.

Response: The Service’s analysis contained in any particular past EA is beyond the scope of this action, which addresses the appropriateness of a categorical exclusion

under NEPA for adding species under the Lacey Act. Nonetheless, the Service cannot clarify information for the commenter because the comment does not specify which two species of fish are being referred to. Of the species listed as injurious, the only fish for which the Service did not prepare an environmental assessment and instead relied upon a categorical exclusion are in the snakehead (Channidae) family, which is generally not considered important to U.S. aquaculture.

Comment 34: Multiple commenters request that the Service advance its decision making by adopting a risk analysis process that embraces the concepts and approaches described in the National Research Council report *Science and Decisions: Advancing Risk Assessment* (National Research Council 2009) to utilize in the decision making process for nonindigenous species valuable to the public as game, food, bait, or ornamental fish, which would be expected to be commercially valuable to U.S. farmers.

Response: The cited report was commissioned by the Environmental Protection Agency (EPA), which was struggling to keep up with the demands for hazard and dose-response information with limited resources. The report states that the regulatory risk assessment process is bogged down. Many of their risk assessments took decades and led to uncertainty in risk assessments and the need for unevaluated chemicals in the marketplace. The goal was to identify practical improvements that EPA could make. Thus, most of the report's conclusions and recommendations were geared toward EPA and their mission.

The Service uses risk assessments in its evaluation of species as injurious as part of the information used for preparing listing rules (for example, the risk assessments for

the black carp (Nico *et al.* 2005) and the large constrictor snakes (Reed and Rodda 2009)), and we will continue to do so. The Service is working on ways to improve its risk assessments and is adapting current modeling techniques specifically for use under the Service's mission. In addition, the Service uses expert opinions (peer review) and stakeholder involvement (through notice and comment) as recommended in the report. Therefore, the Service's process for assessing risk should be in line with the report's goals of reducing the length of time it takes to prepare risk assessments, while also improving them.

Comment 35: Several commenters state their view that the categorical exclusion would diminish industry and public input and would rely only on internal staff or contractors. Similarly, several commenters state their view that consultation with scientists in the academic community, the private sector, and the public sector would provide a more comprehensive perspective than relying only on internal staff or a select group of individuals with a more narrow focus.

Response: The categorical exclusion would not replace the rulemaking process. If a rule is appropriate for a categorical exclusion, the difference in the rulemaking process is that a proposed or final rule would not have an EA or EIS as one of the supplemental documents, nor would it have a finding that corresponds to the EA (either a Finding of No Significant Impact ("FONSI") or the need for an EIS). Instead, the proposed and final rules would include a brief discussion on why the particular listing is appropriate for the categorical exclusion and that none of the extraordinary circumstances applies. All other aspects of the rulemaking process under the Lacey Act and APA would still be required.

The rules would still document the Service's injurious evaluation, the Service would continue to complete all of the required determinations (including under E.O. 12866), and proposed rules would still provide for scientific peer review and a public comment period. The Service would still address environmental and economic aspects in its rules. Proposed and final rules will be published in the **Federal Register**, and supplemental documents, such as those under the Regulatory Flexibility Act, will be made available to the public.

Comment 36: The Service should seek authorization for efficiency improvements for listing species as injurious through Congressional authorization rather than pursuing the categorical exclusion.

Response: As explained in CEQ and Department regulations, complying with environmental review requirements through the categorical exclusion process is a valid form of NEPA review. The Service believes that it has justified why adding species to the list of injurious species under the Lacey Act qualifies for a categorical exclusion.

Comment 37: An organization that advocates on behalf of captive wildlife and works at the state and local level to restrict and ban the private possession of dangerous exotic animals (those that pose significant risk to human health and safety and the environment) strongly supports the allowance of a categorical exclusion in reference to listing injurious species and prohibiting certain species from being imported into the United States and from interstate travel.

Response: The Service appreciates support for its development of the categorical exclusion.

Comment 38: An organization dedicated to amphibian conservation fully supports the Service's efforts to reduce the number of invasive species entering the United States and being transported across State lines. The organization supports placing all amphibians under the Lacey Act so that the Service can prevent amphibian diseases and predatory nonnative species from entering the United States.

Response: The organization is referring to a petition that the Service received regarding amphibians carrying a harmful pathogen. What action, if any, the Service will take in response to this petition is beyond the scope of this action.

Comment 39: Several commenters opposed the categorical exclusion and stated that any use of it should be accompanied by the Service's recognition of the extraordinary circumstances associated with existing and future managed water supply transfers across State lines and hydroelectric operations in the Western United States. Several commenters focused on the essential function of water transfers to a sustainable water supply, how such water supplies are essential to large regions of the United States, and the large number of people served by such projects. Therefore, these commenters asserted that the Service should apply an extraordinary circumstance to aquatic species listings that may affect existing and future interstate managed water supply transfers, especially for species that already exist in the United States.

Response: As discussed earlier, the Service will consider the applicability of all of the extraordinary circumstances found at 43 CFR 46.215 on a case-by-case basis whenever it is considering listing a species as injurious under the Lacey Act. This would include, but not be limited to, if listing the species may "have significant impacts on

public health or safety,” “have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks,” or “have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources.” Whether potential effects on existing or future managed water supply transfers or hydroelectric operations would trigger these or any of the other extraordinary circumstances will need to be assessed at the time of the listing.

Comment 40: If a water supply project involves transporting water over a State line, and if a listed invasive species is already well established on both sides of the State line, then the Service should issue an “extraordinary circumstances” designation that allows the cross-border water transfer to proceed unimpeded.

Response: A new extraordinary circumstance would not allow an interstate water transfer to proceed, contrary to the commenter’s interpretation. An extraordinary circumstance would trigger further analysis in an EA or EIS for an otherwise categorically excludable action. Thus, if an extraordinary circumstance were applicable, the result is that the Service would complete an EA or EIS as part of the species’ listing process under the Lacey Act. The results of the EA or EIS might or might not affect the Service’s decision whether to list the species.

Comment 41: A commenter does not believe that the Lacey Act applies to the water management activities of its members, such as the flow of water during interstate water supply operations and water transfers through conduits, and encourages the Service to include an exemption of these activities in its Departmental Manual from regulation under the Lacey Act.

Response: The scope of the prohibitions under the Lacey Act and specifically whether the transport prohibition applies to injurious species transported in the course of water management activities is beyond the scope of this action, which addresses the appropriateness of a categorical exclusion under NEPA for adding species to the injurious species list. Nonetheless, the Service notes that it cannot simply exempt these or other types of activities from regulation through the Departmental Manual or otherwise.

Comment 42: Some commenters opposed the categorical exclusion and stated that the Department of the Interior manual should recognize interstate water transfers with a new extraordinary circumstance that would trigger further NEPA review through an EA or EIS. Other commenters requested that the extraordinary circumstances under 43 CFR 46.215 be clarified and expanded to specifically address and include water transport. Some commenters noted that the extraordinary circumstance could be restricted to apply only to adding species that already exist in U.S. waters.

Response: The Service believes the existing extraordinary circumstances are sufficient, and we will still have to determine, on a case-by-case basis, whether the listing of any species as injurious would trigger one of the extraordinary circumstances found at 43 CFR 46.215, in which case a normally excluded action would require additional analysis through an EA or EIS.

Comment 43: Unless an extraordinary circumstance is applied to cross-border water supply transfers, the categorical exclusion may be inconsistent with the Bureau of Reclamation (BOR) operations or policies.

Response: A new extraordinary circumstance would not allow an interstate water transfer to proceed, contrary to the commenter's interpretation. An extraordinary circumstance would trigger further analysis in an EA or EIS for an otherwise categorically excludable action. Thus, if an extraordinary circumstance were applicable, the result is that the Service would complete an EA or EIS as part of the species' listing process under the Lacey Act. The results of the EA or EIS might or might not affect the Service's decision whether to list the species.

Comment 44: Western water agencies are working actively to control the spread of invasive species. One agency employs scuba divers 24 hours a day, 7 days a week to scrape quagga mussels from its intake and pumping structures. Other expensive control measures are mentioned. However, the commenter opposed the categorical exclusion and requests that the Service complete an EA and an EIS during the listing process that recognize the social and economic associated with cross-border water transfers.

Response: The Service has explained why adding a species to the list of injurious species under the Lacey Act qualifies for a categorical exclusion (see response to Comment 20). Provided none of the extraordinary circumstances applies, no EA or EIS is therefore required under NEPA. The Service will consider each listing situation on a case-by-case basis (see response to Comment 12). If an extraordinary circumstance is applicable, the Service will prepare, as appropriate, an EA or EIS that will contain all appropriate NEPA analysis for such documents. The Service evaluates certain effects of Lacey Act listings, including economic effects, under other laws and Executive Orders independent of the NEPA process. These include E.O. 12866 (Regulatory Planning and

Review), the Regulatory Flexibility Act, and the Small Business Regulatory Enforcement Fairness Act. None of these is affected by this categorical exclusion.

Comment 45: A number of commenters opposed the categorical exclusion and expressed concern that the Lacey Act prohibits transport of injurious species across State lines during the course of water management activities. In this regard, they discussed their views of the consequences on water management projects. These commenters talked about what they see as possible effects, including prohibiting all water transfers across State lines, future Lacey Act listings making water transfers “all but impossible,” and interrupting or suspending water transfers.

Response: The scope of the prohibitions under the Lacey Act, including whether the transport prohibition applies to injurious species transported in the course of water management activities, is beyond the scope of this action, which addresses only the appropriateness of a categorical exclusion under NEPA. Thus, this action addresses what level of NEPA review should be applied when the agency is considering listing a species as injurious. If the listing of a particular species were to trigger one of the extraordinary circumstances under 43 CFR 46.215, the Service would conduct further analysis and prepare the appropriate documents under NEPA. An EA would discuss the need for the proposal, alternatives to the proposal, and the environmental impacts of the proposed action and alternatives. But it would neither require nor preclude listing the species as injurious or have any effect on what activities are prohibited under the Act. It is also not reasonably foreseeable what actions any particular entity may take in response to a listing under the Lacey Act.

Comment 46: A water agency supports the Service's proposal to create a categorical exclusion for listing species under the Lacey Act, because such an action will promote the Service's goal of protecting the environment from injurious wildlife while ensuring compliance with NEPA. As part of its mission, the water agency monitors and protects reservoirs and streams under its management from invasive species. The Lacey Act is an important element of protection against invasive species. For example, the water agency is acutely aware of the threat quagga mussels and other injurious, invasive *Dreissena* mussel species pose to the waterways under its care. Because of this continuing threat, the water agency continues to work toward the designation of the quagga mussel as an injurious species under the Lacey Act.

Response: The Service agrees that certain aquatic invasive species pose a serious threat to U.S. waterways and water deliveries and strives when appropriate, through listing species as injurious, to prevent that threat, including to water management agencies, throughout the country.

Comment 47: One commenter opposed the categorical exclusion, noting its concern that strict prohibitions on interstate transport of injurious species have been applied to the diversion of water for public supply purposes.

Response: The Lacey Act prohibits the transport of injurious species between States and territories of the United States. The Service has never brought a law enforcement action against a water supply and management entity on a charge that it caused the interstate transport of injurious species as a result of its water management activities.

Comment 48: One commenter asserted that water supply operations and water transfers across State lines do not constitute actions that are prohibited by the Lacey Act. In support of their position, they argue that it is not within the purpose of the Lacey Act when the species is transported due to movement of the medium in which the animals exist, that water management does not constitute transport of a species under 16 U.S.C. 3372, and that water management does not constitute shipment of a species under the Lacey Act (they reference the Nonindigenous Aquatic Nuisance Prevention and Control Act or NANPCA as an example of how Congress does intend to regulate injurious species that are moved in water).

Response: The scope of the prohibitions under the Lacey Act, including whether the transport prohibition applies to injurious species transported in the course of water management activities, is beyond the scope of this action, which addresses only the appropriateness of a categorical exclusion under NEPA (see response to Comment 45). Nonetheless, as explained earlier, the Lacey Act prohibits the transport of injurious species between States and territories of the United States. There is nothing on the face of the statute to indicate that transport of injurious species is exempt when that transport occurs as part of interstate water management operations. The statute does not include limits on the means by which such species could be transported in violation of the law. The commenter is correct that Congress enacted NANPCA to address the unintentional introduction of aquatic species through ballast water. However, there is nothing to suggest that Congress intended NANPCA to be the sole means of restricting the unintentional transport of aquatic injurious species. The commenter indicates that a

contrary conclusion would lead to absurd results and disrupt commerce, but does not indicate what would be absurd about a commercial entity exercising due care to ensure that its operations do not result in the transport of injurious species. The commenter's references to the prohibitions under 16 U.S.C. 3372 and the case *Michigan v. U.S. Army Corps of Engineers*, 911 F. Supp. 2d 739 (N.D. Ill. 2012) are beside the point. That law and the court's holding regarding the movement of Asian carp do not address the scope of the Lacey Act's transport prohibition. The commenter's argument about interpretation of the statutory term "shipment" also relies, in part, on the holding in the *Michigan* case. But just because that court held that activities affecting the dispersal of Asian carp in the Chicago Area Waterway System was not an unlawful transport under 16 U.S.C. 3372 in that case does not mean that a court would find that interstate movement of injurious aquatic species by water management entities is not a violation of the Lacey Act. How the rule of lenity would influence a court's reasoning in a Lacey Act case involving transport of injurious species by a water management entity is also unknown. Finally, the commenter is incorrect that there is no indication whatsoever that Congress intended the Lacey Act to address the interstate transport of aquatic injurious species related to water management activities. In 2010, when Congress amended the Lacey Act to add the bighead carp, one of the bill's sponsors noted that addition of the species would "help deter further intentional or accidental introduction of the species into our waterways" (see 156 Cong. Record 7821).

Comment 49: A few commenters oppose the categorical exclusion on the argument that the justifications in the proposed categorical exclusion did not adequately

support the exclusion. They first point to the Service's statement that listings "ensure that certain potential effects associated with introduction of species that have been found to be injurious do not occur" and note that the zebra mussel has continued to spread despite being listed as injurious by Congress in 1990. They also argue that indirect and incidental environmental effects of listing decisions, such as construction required to avoid a violation of the law, need to be considered in an EA or EIS. This is especially true where the species has no commercial value but may be transferred inadvertently through movement of other goods or resources or the shipping of other things. It may have unintended consequences of causing construction of entirely new infrastructure projects that has its own set of environmental issues. One commenter noted that the Lacey Act does not require a showing that the transport presents a risk of harm before the prohibition applies.

Response: It is true that certain injurious species have spread to additional States following their listing under the Lacey Act. That does not mean, however, that subsequent movement across State lines was consistent with the statute. Regarding consideration of indirect and incidental environmental effects of actions taken by entities to avoid a potential violation of law, the Service cannot reasonably foresee what actions, if any, an entity might take to avoid potentially transporting an injurious species in the course of its water management or similar activities, let alone what environmental effect would occur from these possible actions. There are an almost infinite number of possible responses that various entities might take to avoid transporting a particular injurious species. Several commenters noted the efforts undertaken by the North Texas Municipal

Water District to avoid transporting zebra mussels between Texas and Oklahoma, but also noted that similar efforts by other water managers would not be feasible. Another commenter stated only that some listings might require the construction of “new infrastructure.” Thus, the commenters themselves demonstrate that, while the North Texas Municipal Water District undertook one type of actions, other water managers are likely to take other (unidentified) actions—or none at all. The Service cannot analyze under NEPA indirect effects that are not reasonably foreseeable.

Comment 50: Some commenters who oppose the categorical exclusion and argue that the justifications did not adequately support the exclusion also stated that previous listings that resulted in a FONSI did not involve the legal and practical complexities presented by an aquatic species impacting interstate water supply operations and water transfers. Another commenter asserted that listings of future injurious aquatic species that move through multiple pathways and affect multiple aspects of the environment, such as water supply and quality, along with having economic impacts on industry and recreation, should include consideration of all these effects under NEPA.

Response: The Service disagrees. The agency listed the silver, black, and largescale silver carps (collectively called Asian carps) as injurious in 2007. These aquatic species have the potential to be transported across State lines through water management activities. The EAs for these three species analyzed all reasonably foreseeable direct, indirect, and cumulative effects of the listings and found that adding the species to the list of injurious species would have no significant environmental impact. In addition, as noted earlier (see response to Comment 12), the Service will

consider each potential listing on a case-by-case basis to determine whether the listing of that particular species would trigger one of the “extraordinary circumstances” found at 43 CFR 46.215, in which case a normally excluded action would require additional NEPA analysis through an EA or EIS.

Comment 51: The categorical exclusion will not make the injurious species listing process more effective and efficient. On the contrary, environmental review of listing effects on otherwise lawful activities will actually be postponed and become more complicated.

Response: We disagree. The Service will evaluate early in the listing process whether any of the extraordinary circumstances at 43 CFR 46.215 apply and thereby determine early in the rulemaking process whether an EA or EIS should be completed. This step is not expected to slow down the listing process, even if the Service determines that an EA or EIS is needed.

Comment 52: Enforcement under the Lacey Act could conflict with interstate agreements and undermine authorized purposes of the Federal Government’s water storage and distribution facilities throughout the West.

Response: Possible enforcement actions under the Lacey Act are beyond the scope of this action, which addresses only the appropriateness of a categorical exclusion under NEPA for adding species to the list of injurious species.

Comment 53: The Service says it would use a separate NEPA review for any control measures needed to deal with an injurious species, yet the Service does not have regulatory authority over such control measures.

Response: Control measures can be conducted under the Service's or another Federal, State, tribal, or territorial agency's legal authority. For example, any injurious species control measures on national wildlife refuges would be conducted under the Service's refuge management authorities.

Comment 54: Some commenters expressed concern that the zebra mussel listing incurred tremendous costs in the North Texas Municipal Water District. One commenter argued that this serves as an example of how Lacey Act listings can disrupt water supply operations. Other commenters noted that for water management agencies to similarly prevent the occurrence of zebra mussels, quagga mussels, or other aquatic invasive species in public water systems would be impracticable, and listing the species would make it impossible to operate public water supplies without untenable exposure to criminal liability, threatening their viability and cost-effective operations.

Response: The Service recognizes the extent to which the North Texas Municipal Water District has gone to prevent the interstate transport of zebra mussels. This extensive cost is what the Service hopes to preclude by listing species before they become introduced or established. Please also see our response to Comment 45.

Comment 55: A city mayor was concerned that the "fast-track" of listing where water supplies are concerned would incur significant costs for them in fines.

Response: As noted earlier, the prohibitions under the Lacey Act and possible enforcement actions are beyond the scope of this action, which addresses only the appropriateness of a categorical exclusion under NEPA for adding species to the list of injurious species.

Comment 56: If the Service is concerned about efficiency in the injurious listing process, the Service should more thoroughly examine the other elements required for the listing process. One commenter noted that an EA or EIS could be developed concurrently with other analyses required to list a species.

Response: The Service is reviewing all elements of the listing process to make it more efficient within its authorities. But the Service has made its case that adding species as injurious meets the standards for a categorical exclusion (see response to Comment 20). Conducting NEPA review through the categorical exclusion process is expected to result in a more efficient listing process.

Comment 57: The categorical exclusion might restrict the ability of circuses, zoos, and other licensed exhibitors to transport animals across State lines.

Response: It is unclear how the categorical exclusion might restrict certain entities from transporting animals across State lines when the categorical exclusion is related only to the type of NEPA review conducted when the Service is considering a species for listing. In addition, the Lacey Act allows for the issuance of permits authorizing interstate transport or import for, among other things, zoological purposes. Licensed exhibitors and zoos may apply for a permit.

Categorical Exclusion

The Department and the Service find that the category of actions described in the categorical exclusion at the end of this notice does not individually or cumulatively have a significant effect on the human environment. This finding is based on the analysis that the listing action preserves the environmental status quo: It maintains the baseline

population of the species and any environmental effects related to the presence or absence of the species. All previous NEPA reviews of species listings have consistently resulted in Findings of No Significant Impact. Finally, the categorical exclusion is consistent with existing approved Service categorical exclusions involving introduction of nonindigenous species.

Adding species to the list of injurious wildlife meets the standard for a category of actions that does not individually or cumulatively have a significant effect on the human environment because it merely preserves the environmental status quo within the United States. The Lacey Act prohibits importation into the United States and interstate transport of any animals already located within the United States. Therefore, the Lacey Act has two regulatory and environmental effects. For species not yet imported into the United States, it prevents them from entering the country and thereby avoids any environmental impact—positive or negative—that otherwise would be caused by the species. For injurious animals that were imported into the United States prior to the species' listing, it prevents the species spread to additional States and U.S. territories where it does not yet occur and thereby avoids any environmental impact—positive or negative—from the species in these other areas. But the Lacey Act does not prohibit possession or transport within a State or U.S. territory where the species already occurs. Therefore, a Lacey Act listing may do little to prevent environmental effects in States and territories where injurious animals already occur. Federal, State, territorial, and tribal agencies; environmental groups and associations; and individuals may undertake control measures to reduce or eliminate the species already in their State or territory, but these actions are

not taken under the authority of the Lacey Act. Likewise, State, territorial, or tribal governments may enact laws that prohibit possession or other activities with the species within their State or territory, but these also are not under the authority of the Lacey Act. In the absence of such additional actions, people can continue to own, breed, and sell injurious animals already located within their State or territory, as allowed under State, territorial, or tribal law.

Therefore, listing species under the Lacey Act ensures that certain adverse effects associated with the introduction of injurious species will not occur. The injurious species listings maintain the state of the affected environment into the future—the state of the environment prior to listing and prior to potential introduction in the absence of a listing. Thus, preventing a nonindigenous injurious species from being introduced into an area in which it does not naturally occur cannot have a significant effect on the human environment.

Because the categorical exclusion also serves to make the listing process under the Act more efficient and adding species to the injurious species list has the sole purpose of limiting undesirable environmental effects in the future, the categorical exclusion itself supports maintenance of the environmental status quo.

This categorical exclusion also is consistent with the conclusions of every NEPA review conducted in conjunction with adding a species as injurious under the Lacey Act. Every EA prepared as part of an injurious species listing since 1982 (the first rule promulgated after environmental-assessment guidance was established under NEPA) has resulted in a finding that adding the species as injurious would have no significant

environmental impact (a FONSI) without requiring mitigation measures and, therefore, did not require preparation of an EIS. See our July 1, 2013, notice proposing the categorical exclusion (78 FR 39307) for a list of past EAs and the environmental effects analyzed in those EAs. While these species, when present in an U.S. ecosystem, may have a significant effect on the environment, the regulatory action of adding them to the list of injurious species has no significant effect for the reasons explained above. That each EA has resulted in a FONSI strongly suggests that subsequent listings will also have no significant environmental impacts.

Finally, this categorical exclusion is consistent with existing Service categorical exclusions. For example, the Departmental Manual already includes a categorical exclusion for research, inventory, and information collection activities directly related to the conservation of fish and wildlife resources as long as they do not involve, among other things, “introduction of organisms not indigenous to the affected ecosystem” (see 516 DM 8.5 B (1)). Thus, research, inventory, and information collection activities related to conservation of fish and wildlife resources that would involve the introduction of nonindigenous species would require additional NEPA review, while the absence of that effect, among other things, does not. This categorical exclusion therefore recognizes the potential environmental impact from nonindigenous species introductions that should be analyzed through an EA or EIS. Here, adding a species as injurious under the Lacey Act prevents the introduction of a nonindigenous species not already present (either in particular States and territories or, for species not yet imported, in the United States overall), thereby avoiding any environmental effect that would be caused by the species.

CEQ has reviewed the Service's summary of the substantive comments it received and its responses to those comments. CEQ approved the Department of the Interior's categorical exclusion in a letter dated September 25, 2015. Therefore, the Department is adding a categorical exclusion to the Department Manual at 516 DM 8.5 C, which covers "Permit and Regulatory Functions." This section includes approved categorical exclusions that address, among other things, the issuance of regulations pertaining to wildlife. This addition would provide for a categorical exclusion for only the regulatory action of listing species as injurious (that is, adding a species to one of the lists in 50 CFR part 16). The regulatory listing action places the species on a list that prohibits their importation into the United States and interstate transportation.

The Service recognizes that certain potential species listings, when reviewed on a case-by-case basis, could trigger one of the extraordinary circumstances for which it is not appropriate to utilize the categorical exclusion. In such cases, the potential listing could have a significant environmental effect and would require additional NEPA analysis. These extraordinary circumstances include, but are not be limited to, listings that may have highly controversial environmental effects, involve unresolved conflicts concerning alternative uses of available resources, have highly uncertain and potentially significant environmental effects, or involve unique or unknown environmental risks (43 CFR 46.215). Thus, prior to applying the categorical exclusion when considering adding a species as injurious under the Act, the Service will review all of the extraordinary circumstances in the Department's NEPA regulations. If any extraordinary circumstance does apply, the Service will conduct additional NEPA analysis and prepare an EA or EIS.

The categorical exclusion does not cover all Service activities related to injurious species. For example, the categorical exclusion does not cover control actions (such as constructing barriers) or eradication actions (such as applying pesticides). Any such injurious species management measures conducted by the Service will undergo appropriate NEPA analysis and documentation prior to implementation of the action. The categorical exclusion also does not cover the issuance of permits (available for individual specimens imported or transported for zoological, educational, medical, or scientific use), which is already covered under an existing categorical exclusion (516 DM 8.5 C(1)). The categorical exclusion also does not cover the removal of species from the injurious wildlife lists under the Act.

Amended Text for the Departmental Manual

The text that will be added to 516 DM (see **ADDRESSES**) is set forth below:

Part 516: National Environmental Policy Act of 1969

Chapter 8: Managing the NEPA Process—U.S. Fish and Wildlife Service

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8.5 Categorical Exclusions.

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C. Permit and Regulatory Functions.

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(9) The adding of species to the list of injurious wildlife regulated under the Lacey Act (18 U.S.C. section 42, as amended) as implemented under 50 CFR subchapter

B, part 16, which prohibits the importation into the United States and interstate transportation of wildlife found to be injurious.

Dated: September 30, 2015

Signed: _____

Willie R. Taylor

Director, Office of Environmental Policy and Compliance

Billing Code 4333-15

[FR Doc. 2015-27360 Filed: 10/28/2015 08:45 am; Publication Date: 10/29/2015]